No. 23A-_____

IN THE

Supreme Court of the United States

DEWBERRY GROUP, INC.,

Applicant,

v.

DEWBERRY ENGINEERS INC.,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Under this Court's Rule 13.5, Applicant Dewberry Group, Inc., respectfully requests a 60-day extension of time, to and including February 16, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.* The court of appeals entered its judgment on August 9, 2023, App., *infra*, 1a, and denied Applicant's timely petition for panel rehearing and rehearing en banc on September 19, 2023, *id.* at 58a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on December 18, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Counsel for Respondent Dewberry Engineers Inc. does not oppose this request.

1. This case presents an important and recurring question concerning the remedies available for federal trademark-law claims under the Lanham Act, 15 U.S.C. § 1051 *et seq*. The Lanham Act authorizes a court to order (*inter alia*) disgorgement of a "defendant's profits," "subject to the principles of equity." *Id.* § 1117(a). For more than a century, this Court has held that traditional principles of equity generally restrict profit-disgorgement recoveries to a defendant's *own* profits. See, *e.g.*, *Liu* v. *SEC*, 140 S. Ct. 1936, 1945 (2020); *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 140 (1878). The court of appeals in this case rejected that principle, and in so doing it diverged from multiple other circuits and this Court's precedent.

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* Under this Court's Rule 29.6, Applicant Dewberry Group, Inc., f/k/a Dewberry Capital Corporation, states that it is not publicly traded and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

a. John Dewberry founded Applicant, originally named Dewberry Capital Corporation, to develop, lease, and manage commercial properties. App., *infra*, 4a. In 2007, Dewberry Capital Corporation and another real-estate entity, Respondent Dewberry Engineers Inc., settled dueling trademark claims. *Id.* at 5a. Applicant later rebranded itself as Dewberry Group, Inc., created several sub-brands (Dewberry Living, Dewberry Office, and Studio Dewberry), and produced marketing materials for its affiliates that lease commercial properties in Georgia, Virginia, South Carolina, and Florida. *Id.* at 6a.

b. In 2020, Respondent brought this Lanham Act suit, naming Applicant as the sole defendant. App., *infra*, 9a. Respondent's suit alleged (as relevant) that Applicant's rebranding infringed Respondent's registered "Dewberry" mark. *Ibid.*

The district court granted summary judgment to Respondent on its trademark-infringement claim. App., *infra*, 9a. Among other remedies, the court ordered Applicant to disgorge nearly $43 million in profits that its affiliates had purportedly earned from the use of Respondent's mark. *Id.* at 33a. Respondent did not name those separate legal entities as defendants, allege contributory infringement, or assert that Applicant was liable on an alter-ego theory. See *id.* at 54a-55a (Quattlebaum, J., concurring in part and dissenting in part). The district court, however, treated Applicant and its affiliates "as a single corporate entity" in calculating Applicant's profits. *Id.* at 10a (majority opinion).

c. The court of appeals affirmed in a divided decision. App., *infra*, 1a-45a.

i. The panel majority acknowledged that a "grant of profit disgorgement is 'subject to the principles of equity.'" App., *infra*, 42a (quoting 15 U.S.C. § 1117(a)).

The majority also recognized that Applicant "did not receive the revenues from its infringing behavior directly." *Ibid.* And it underscored that the district court had not "pierce[d] the corporate veil" between Applicant and its affiliates. *Id.* at 41a. The majority nevertheless upheld the order directing Applicant to disgorge its affiliates' profits on the theory that Applicant had somehow "still *benefited* from its infringing relationship with its affiliates." *Id.* at 42a. The majority stated that the district court had "discretion" to disregard traditional principles of corporate separateness and veil-piercing in order to prevent infringers from "using corporate formalities to insulate their infringement from financial consequences." *Id.* at 42a-43a.

ii. Dissenting on the disgorgement issue, Judge Quattlebaum objected to the "use of revenues from separate companies," which are "affiliated with" Applicant but not parties to the case, to assess the profits attributable to Applicant itself. App., *infra*, 54a; see *id.* at 54a-56a. Judge Quattlebaum explained that a plaintiff seeking to recover profits from a defendant's affiliates must either sue those affiliates or else "pierce" the defendant's "corporate veil." *Id.* at 55a. Judge Quattlebaum "kn[e]w of no law that allows courts * * * to disregard those options and simply add the revenues from non-parties to a defendant's revenues for purposes of evaluating the defendant's profits." *Ibid.* In his view, therefore, ordering Applicant to disgorge "revenues from the affiliated companies"—undisputedly "separate corporate entities"—that "were never realized by [Applicant]" itself was "incorrect as a matter of law." *Id.* at 56a.

2. The Fourth Circuit's holding that the Lanham Act permits federal courts to order disgorgement of profits from a defendant based on alleged gains received by its affiliates without regard to veil-piercing principles warrants this Court's review.

The decision below conflicts with decisions of at least two other circuits that do not permit recovery under the Lanham Act from a defendant based on the acts of a separate, affiliated entity absent a showing by the plaintiff sufficient to pierce the corporate veil or to treat the affiliated entity as the defendant's alter ego. In *U-Haul International, Inc.* v. *Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986), the Ninth Circuit reversed a Lanham Act award ordering an infringing corporation's founder to pay $40 million (including disgorging profits) for infringing the plaintiff's trademarks, where the plaintiff failed to prove that the company was the founder's alter ego. *Id.* at 1043. Although the record contained "ample evidence" that the founder "controlled" and "subsidized" the company, the plaintiff had not met the requirements to pierce the corporate veil, so the founder could not be liable. *Ibid.* Similarly, in *Edmondson* v. *Velvet Lifestyles, LLC*, 43 F.4th 1153 (11th Cir. 2022), the Eleventh Circuit reversed a Lanham Act award against an infringing limited-liability company's managing member and president where "the plaintiffs did not argue or establish that the corporate veil should be pierced." *Id.* at 1162; see *id.* at 1160, 1162-1163. The Fourth Circuit's holding here—that courts may disregard corporate separateness and order a defendant to disgorge profits of affiliated entities *without* applying traditional veil-piercing principles, App., *infra*, 41a-43a—is irreconcilable with those decisions.

The Fourth Circuit's approach is also incorrect. The plain language of the Lanham Act permits recovery of the "*defendant's* profits," and only to the extent permitted by "the principles of equity." 15 U.S.C. § 1117(a) (emphasis added). Congress's express incorporation of equitable principles includes "limitations upon [the] availability" of a remedy "that equity typically imposes." *Great-West Life &*

Annuity Insurance Co. v. *Knudson*, 534 U.S. 204, 211 n.1 (2002). Under deeply rooted equitable principles, a court may order a defendant to disgorge only profits that it actually received. *Liu*, 140 S. Ct. at 1946. Nothing in the Lanham Act "reject[s] th[e] bedrock principle" that a corporation "is not liable for the acts" of affiliates except when "the corporate veil may be pierced." *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998). As the Second Circuit explained in the cognate context of copyright, a profit-disgorgement award (absent veil-piercing) thus may "reach only the defendants' profits," not those earned by non-party affiliates. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (1939) (L. Hand, J.). The Fourth Circuit's freewheeling approach, which grants courts open-ended "discretion" to disregard corporate separateness without regard to the requirements for piercing the corporate veil, App., *infra*, 42a, contravenes those settled principles.

3. Counsel for Applicant had no involvement in the proceedings below and were retained only recently in order to prepare a petition for a writ of certiorari. Additional time is necessary in order to permit counsel to complete a review of the record below, to research the relevant legal issues in this case, and to prepare and file a petition that would be helpful to the Court. Also, counsel for Applicant have had—and will continue to have—significant professional responsibilities in other time-sensitive matters, and preexisting professional and personal travel plans, in the period shortly before and after the current December 18 deadline.

4. Counsel for Respondent does not oppose the requested extension.

Accordingly, Applicant respectfully requests that its time to file a petition for a writ of certiorari be extended by 60 days, to and including February 16, 2024.

Respectfully submitted.

/s/ Helgi C. Walker

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